

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In re the Marriage of:

Serv Wahan,

Respondent,

v.

Sharmila Ahmed,

Appellant.

No. 79491-4-I

DIVISION ONE

UNPUBLISHED OPINION

LEACH, J. — Sharmila Ahmed and Serv Wahan both appeal a parenting plan entered after a modification proceeding. Ahmed challenges the trial court’s finding of a substantial change in circumstances, claims the mutual decision making provisions conflict with an applicable statute, and contends the court ordered change was not in the best interest of the children. Wahan claims the trial court abused its discretion in ordering separate residential schedules and in ordering mutual decision making. Substantial evidence supports the court’s finding of a substantial change of circumstance. But, because both parents objected to mutual decision making, the trial court should not have ordered it. So, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Sharmila Ahmed and Serv Wahan have twin boys, B.W. and C.W. B.W. suffered a traumatic brain injury at 11 weeks old and was later diagnosed with

autism spectrum disorder. B.W. requires significant assistance at home, and at school, as he has learning impairments, speech and language delay, fine motor weakness, anxiety, impulsivity, and ADHD.

In 2014, Wahan started dissolution proceedings that lasted for over a year. Ahmed alleged domestic violence and sought “191” restrictions.<sup>1</sup> Wahan alleged parental alienation and abuse of conflict and sought a 50/50 residential schedule.

After trial, the court entered a final parenting plan in September 2015. The parenting plan ordered the children to live primarily with Ahmed and to live with Wahan on alternating weekends plus vacations and some holidays. It also gave Wahan visitation on Mondays from 5:30 p.m. to 7:30 p.m. The parenting plan also stated that either parent could request a review of the residential schedule when the children turned 13. The court gave Ahmed sole decision making for medical, education, and activity based decisions. The plan required Ahmed to inform Wahan of “any proposed change in a school or health care provider” and the reason for the change, and allowed Wahan’s input on any such change.

On January 6, 2017, after the children turned 13, Wahan asked the court to modify the parenting plan. Wahan claimed Ahmed “actively [engaged] in restrictive gatekeeping/parental alienation resulting in damage to the children’s emotional health.” He also claimed she “at least twice initiated and/or instructed others to make false CPS reports...violated the current parenting plan by refusing to engage

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<sup>1</sup> RCW 26.09.191 places certain restrictions in temporary or permanent parenting plans based on various factors.

the children in therapy, failing to inform [Wahan] of changes in health care providers, and failing to follow requirements for engaging...child care providers.”

The court found adequate cause and appointed a Guardian Ad Litem (GAL), Elise Buie. Buie issued a 132 page interim GAL report. Her report included various recommendations like spending every weekend with Wahan, majority mutual decision making, and appointing a parent coordinator who would have decision making authority in day to day decisions. She also recommended counseling for C.W. and an anger management class for both Wahan and Ahmed.

Trial began on June 12, 2018 and ended July 5, 2018. On August 22, 2018, the court granted a temporary order implementing a parenting plan pending its final decision. The temporary order restored B.W.’s time with Wahan to every other weekend and a midweek dinner to be “gradually implemented as recommended by the treatment providers,” and ordering that C.W. alternate weeks between his parents.

On December 20, 2018, the court made findings of fact and conclusions of law supporting its decisions, entered an order on modification, a final parenting plan, and appointed a parenting coordinator. The court noted Wahan asked to modify the 2015 parenting plan based on the plan’s provision allowing a modification request when the children turned 13 and because B.W.’s former aide, Esther Shon, testified that she provided false testimony during the first trial and made false declarations. It found that Ahmed’s “use of her sole decision-making power without involving [Wahan] at all, marginalized [Wahan’s] role as a parent.”

The court also entered “191” findings against Ahmed for “long-term emotional or physical problem” and abusive use of conflict.

In the final parenting plan, the court adopted the temporary order’s parenting time, and ordered mutual decision making “with the assistance of the parenting coordinator.” Ahmed appeals and Wahan cross-appeals.

#### STANDARD OF REVIEW

This court reviews parenting plan decisions for manifest abuse of the trial court’s broad discretion.<sup>2</sup> Only if the trial court makes a manifestly unreasonable decision or bases its decision on untenable grounds or untenable reasons does it abuse its discretion.<sup>3</sup> The appellant bears the “heavy burden of showing a manifest abuse of discretion.”<sup>4</sup> We accept unchallenged findings of fact as true on appeal.<sup>5</sup>

#### ANALYSIS

Ahmed claims the trial court should not have modified the original parenting plan because: 1) no substantial change of circumstances had occurred, 2) the children suffered no detriment under the 2015 parenting plan, 3) statutory decision-making criteria prohibited mutual decision making, 4) the court gave impermissible power to the parenting coordinator, and 5) the GAL was biased. Wahan claims the

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<sup>2</sup> In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014); In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012).

<sup>3</sup> Chandola, 180 Wn.2d at 642; Katare, 175 Wn.2d at 35.

<sup>4</sup> In re Marriage of Kim, 179 Wn. App. 232, 240, 317 P.3d 555 (2014) (quoting In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985)).

<sup>5</sup> Nelson v. Washington State Dep’t. of Labor & Indus., 175 Wn. App. 718, 723, 308 P.3d 686 (2013).

trial court abused its discretion in ordering separate residential schedules and in ordering mutual decision making rights.

#### A. SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Ahmed contends the court should not have modified the parenting plan because there was no substantial change of circumstances.

A court must find a substantial change in circumstances of the child or the nonmoving party before modifying a parenting plan.<sup>6</sup> The court must also find that modification is necessary for the child's best interests.<sup>7</sup> The court may alter the residential schedule if "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."<sup>8</sup>

First, Ahmed claims no substantial change in circumstances occurred because "the facts litigated in 2018 were litigated in 2015 and the plan resulting from that litigation perpetuated the family's division of labor pre-dissolution..." But, after the court issued the original parenting plan, Wahan told the court that Esther Shon, the family's caregiver, submitted false declarations and provided false testimony on behalf of Ahmed. Shon falsely testified that she saw Wahan drag B.W. up the stairs, saw Wahan play violent video games, and "exaggerated comments to make [Wahan] look bad."

Also, the 2015 parenting plan required Ahmed to inform Wahan of medical decisions. Ahmed admits that she told B.W.'s speech therapist Darcy Kelley she

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<sup>6</sup> RCW 26.09.260.

<sup>7</sup> RCW 26.09.260.

<sup>8</sup> RCW 26.09.260(2)(c).

need not notify Wahan of appointments. She said that “[i]f Wahan thought this interpretation too narrow, he could have sought clarification or correction. But, Wahan testified about other instances when Ahmed failed to tell him about her medical decisions like failing to inform him of B.W.’s oral surgery. They are substantial evidence of a substantial change of circumstances.

Ahmed next asserts that parental alienation, emotional impairment, and abusive use of conflict did not happen. The parties presented conflicting evidence on these issues and the trial court accepted Wahan’s evidence and not Ahmed’s. We defer to the trial court’s credibility decisions.

Ahmed repeatedly failed to tell Wahan of medical decisions regarding B.W. and asked various people to file CPS reports based on information Ahmed told them while not having any first-hand knowledge of the information they were reporting. While having sole decision making power, Ahmed failed to enroll B.W. at a high school both parents previously agreed to, forcing B.W. to attend a different school. The court noted how “Ahmed failed to timely respond to things,” and told “one or both children that [Wahan’s] family [was] no longer the children’s family.” The trial court’s findings support its conclusions that Ahmed engaged in parental alienation, emotional impairment, and abusive use of conflict. These findings also establish a substantial change in circumstances supporting the court’s modification of the 2015 parenting plan.

#### B. THE CHILDREN SUFFERED DETRIMENT

Ahmed also claims the trial court should not have modified the parenting plan because the children suffered no detriment under the 2015 plan. She asserts

the children continued to do well, “but nothing about this conflict was new or different.”

Ahmed does not challenge the sufficiency of the evidence to establish that the children suffered detriment. But, given her claim, we review the record to decide if substantial evidence supports the trial court’s findings of fact on this issue.<sup>9</sup> Substantial evidence exists when the record includes enough evidence to persuade a fair-minded, rational person of the truth of the finding.<sup>10</sup> “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.”<sup>11</sup>

Here, the trial court made many findings showing the present environment is detrimental to the children’s mental or emotional health. First, the trial court made a finding of fact that Rosalind Oti, B.W.’s clinical psychologist, “believes it is important for both parents to be involved in [B.W.’s] care” and his extracurricular activities. So, Ahmed’s history of interfering with Wahan’s involvement in B.W.’s medical decisions was contrary to his provider’s view of B.W.’s best interests.

Second, Ahmed attempted to alienate her children from Wahan by telling them that “[Wahan’s] family is no longer [their] family.” Also, Ahmed asked or suggested others to report Wahan to CPS even though those individuals had no first-hand experience of abuse. So, substantial evidence shows that the children’s

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<sup>9</sup> Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

<sup>10</sup> Spreen v. Spreen, 107 Wn. App. 341, 346, 28 P.3d 769 (2001) (citing Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

<sup>11</sup> Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 343 P.2d 183 (1959)).

environment cultivated by Ahmed after the 2015 plan was detrimental to the children's mental or emotional health.<sup>12</sup>

### C. DECISION MAKING AUTHORITY

Ahmed contends the trial court should not have changed sole decision making to mutual decision making because there had been no substantial change in circumstances, the statutory decision making criteria prohibited mutual decision making, and a change was not in the best interest of the children.

A permanent parenting plan must allocate decision making authority about education, health care, and religious upbringing.<sup>13</sup> The trial court shall order "sole decision making" if it finds that RCW 26.09.187 mandates a limitation on one parent's decision making, if "[b]oth parents are opposed to mutual decision making," or if "[o]ne parent is opposed to mutual decision making, and such opposition is reasonable based on" mutual decision making criteria.<sup>14</sup>

At trial, each parent requested sole decision making authority for the children. Because of the parties' contrary positions, RCW 26.09.187(2)(b)(ii) required the trial court order sole decision making. The trial court abused its discretion in ordering mutual decision making.

### D. PARENTING COORDINATOR

Ahmed claims the trial court impermissibly delegated the court's authority to a parenting coordinator.

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<sup>12</sup> For the same reasons that substantial evidence exists, showing the children suffered detriment in the 2015 plan, substantial evidence exists showing the new parenting plan was in the best interests of the children.

<sup>13</sup> RCW 26.09.184(5)(a).

<sup>14</sup> RCW 26.09.187(2)(b)(ii), RCW 26.09.187(2)(b)(iii).

Any modification of a parenting plan, no matter how slight, requires an independent inquiry by the court.<sup>15</sup> Here, the court gave the parenting coordinator the authority to adjust B.W.'s visitation schedule with input from B.W.'s providers, and to change decision making from mutual decision making to sole decision making.

Because these provisions give the parenting coordinator authority to modify the parenting plan without an independent inquiry by the court, the trial court abused its discretion in allowing the parenting coordinator to change the mutual decision making to sole decision making and to change B.W.'s visitation schedule.

#### E. AHMED DOES NOT ESTABLISH THAT THE GAL WAS BIASED

Ahmed contends the GAL was biased and her bias influenced the judge. She claims the GAL showed bias because she failed to "tailor the investigation to the legal context...the inquiry a modification requires compared to an original parenting action, which looks for new facts and changed circumstances." She also claims "the [GAL] [focused on] selective facts from the 2015 proceeding and [reweighed]...that evidence to reach conclusions at odds with those reached by [the judge from the first trial]. Finally, she claims the GAL spent excess time, money, and pages on this case, and that she favored Wahan and paternal involvement.

In support of her claim, Ahmed states that one of B.W.'s providers "had to fight with [the GAL] to get her views accurately reported..." But, it is not uncommon

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<sup>15</sup> In re Smith-Bartlett, 95 Wn. App. 633, 640, 976 P.2d 173 (1999).

for a misunderstanding to occur when a legal professional interprets information from a medical provider. Showing a misunderstanding does not establish bias.

Ahmed also claims the GAL “made much of Ahmed’s ‘lack of support for dad’s relationship with the boys,’ and said it was ‘creating a detrimental environment in her home.’” The record establishes beyond challenge that Ahmed and Wahan had a tumultuous relationship. So, the record supports the GAL’s observation that one of the parents lacked support for the other’s relationship with the children. Ahmed has not established that the GAL was biased.

#### F. INADMISSIBLE HEARSAY EVIDENCE

Ahmed claims the trial court should have admitted Judge Eadie’s oral ruling after the 2015 trial. The trial court excluded it as inadmissible hearsay evidence and irrelevant.

To be relevant, evidence must have some tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>16</sup> A trial court abuses its discretion if it improperly applies an evidence rule.<sup>17</sup>

Ahmed offered Judge Eadie’s statement that, “[Ahmed] had done a fabulous job” during trial. Because this statement does not have any tendency to make the existence of any fact of consequence more or less probable, the trial court did not abuse its discretion in refusing to admit the statement.

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<sup>16</sup> ER 401.

<sup>17</sup> State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

## G. RESIDENTIAL SCHEDULES

On cross-appeal, Wahan claims the trial court abused its discretion in concluding that it is in B.W.'s best interests to continue with the 2015 parenting plan's schedule. He claims "the trial court's findings contain absolutely no justification for putting the boys on two different residential schedules."

Here, the trial court made the following unchallenged findings of fact, which we accept as true.

7. ...Ahmed took charge of researching, finding, and coordinating all of [B.W.'s] medical needs and care.

65. [Dr. Alison Golumbeck, B.W.'s psychiatrist] said the primary drivers of anxiety for [B.W.] are dislike of change...

While Wahan explains that Ahmed engaged in gatekeeping, parental alienation, and abusive use of conflict, he fails to explain with any medical testimony, how it would be in B.W.'s best interest, given his anxiety with change, to change his visitation schedule. So, the trial court did not abuse its discretion in continuing the 2015 schedule.

## H. ATTORNEYS' FEES

Both parties request attorneys' fees. RCW 26.09.140 allows us to order a party to pay the other party for maintaining the appeal and the attorneys' fees in addition to statutory costs. But, neither party has demonstrated financial need. So, we deny both requests.

## CONCLUSION

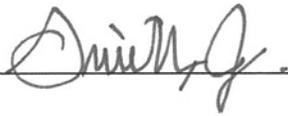
We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Ahmed has shown that the trial court should not have

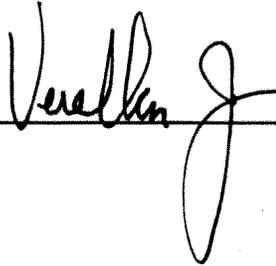
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ordered mutual decision making or delegated certain authority to the parenting coordinator. But, her remaining claims fail.

  
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WE CONCUR:

  
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